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No. 92-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BANK ONE, TEXAS, N.A., AND BANC ONE CORPORATION,
Petitioners,

—vs.—

WICHITA FALLS OFFICE ASSOCIATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a split of authority in the Courts of Appeal regarding the interpretation and application of Rule 56(f) justifying issuance of a writ of certiorari?

2. Whether the Court of Appeals for the Fifth Circuit, consistent with the uniform view of Rule 56(f) in the Circuits, properly reversed a grant of summary judgment on plenary review because of the absence of a full and fair opportunity for discovery?

RULE 29.1 STATEMENT

Respondent Wichita Falls Office Associates is a partnership with no parent or subsidiary companies.

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STATEMENT OF THE CASE

Petitioners assert that "Respondent never directed any of its discovery at Petitioners' pending motion for summary judgment." (Pet. at 8). The Court need not long be detained by that assertion. Petitioners concede that Respondent informed the District Court that the discovery related to matters that would "support its opposition to the defendants' motion for summary judgment" and "its existing causes of action." (Pet. at 9-10).

The discovery needed to oppose Petitioners' summary judgment motion, actually issued well prior to the grant of summary judgment, included in excess of a dozen notices of deposition and numerous document requests. It was highly controverted. The District Court had before it Petitioners' motion for a protective order to prevent the discovery, the Magistrate Judge's denial of the motion, *and* Respondent's extensive opposition to that motion, when it improperly terminated discovery and entered summary judgment in favor of Petitioners. (*See* Respondent's principal appellate memorandum at 14-17; Respondent's reply appellate memorandum at p. 7).[1]

Thus, on *de novo* review, the Fifth Circuit observed:

> WFOA did specify its intended subject matter in its request for supplemental depositions and in document requests . . . Unquestionably, these requests related directly to the pending summary judgment motion.
>
> The amalgam of WFOA's actions did put the trial court on notice that it sought discovery regarding

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[1] It is noteworthy that Petitioners' motion for a protective order was initially denied by the Magistrate Judge. *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992).

> the Rainey letter, the bank's calculation of rent, interpretive documents relating to Section 4.4(d), and the bank's policy on disaffirmance.
>
> These issues were germane to the pending summary judgment motion and therefore the stay [of discovery] was improvidently granted. While we are generally reluctant to substitute our judgment for that of the district court, we think it wiser for the district court to defer its summary judgment determination until after WFOA has had a chance to obtain its requested discovery.

978 F.2d at 919-20 (material in brackets added).

Petitioners also imply that the District Court never authorized Respondent's discovery and that it was untimely. (Pet. at 11.) On February 6, 1991, the District Court issued a scheduling order setting a discovery cutoff date of July 22, 1991. Respondent served the discovery at issue on April 3, 1991. Moreover, the District Court's scheduling orders were issued at the request of the parties, *including the Petitioners.* In fact, the January 30, 1991 joint status report (not submitted by Petitioners with their Petition) said:

> Counsel for WFOA *and for the Banc One defendants* have conferred and agree that, in the event that settlement with the FDIC goes forward, *both parties would request a new Scheduling Order* enlarging the time to designate experts, add parties, make motions and the like in order to accommodate the new configuration of the case after settlement with the FDIC.

(R. 860-62, emphasis supplied).

SUMMARY OF ARGUMENT

The "conflict" Petitioners urge does not exist. No case cited by the Petitioners supports a different result than the one that occurred here.

Moreover, even if this interlocutory case was remanded on certiorari, the Fifth Circuit would proceed to review the summary judgment record *de novo*, and the Fifth Circuit has already recognized the merits of Respondent's opposition to Petitioner's motion for summary judgment when it discussed how and why the terminated discovery was directly relevant to the motion. Thus, the case would end up back in the district court, where it is now.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT INVOLVE A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW.

Petitioners claim that certiorari is required because the Fifth, Eleventh, Ninth, Fourth, First and D.C. Circuits "have all ruled . . . that it is unnecessary for the nonmovant to comply with Rule 56(f)" while other circuits require "strict compliance" with the Rule. (Pet. at 12, 16.)

There is no such conflict. First, the Fifth Circuit did not misapply Rule 56(f) here. Second, the interpretation of Rule 56(f) followed in this and other cases is wholly consistent with the application of Rule 56(f) throughout all the circuits. Certiorari is thus inappropriate because "the asserted conflict in decisions arises from differences in states of fact, and not

in the application of a principle of law." *Wisconsin Electric Co. v. The Dunmore Co.*, 282 U.S. 813 (1930).[2]

In fact, the "exception" to Rule 56(f)'s procedural rigors was applied here only because Respondent fully complied with the substantive requirements of the Rule. Respondent "diligently [pursued] relevant discovery" and it

> (i) [requested] extended discovery prior to the court's ruling on summary judgment; (ii) put the trial court on notice that further discovery pertaining to the summary judgment motion is being sought; and (iii) [demonstrated] to the trial court specifically how the requested discovery pertain[ed] to the pending motion.

978 F.2d at 919 (citations omitted) (material in brackets added).

The Fifth Circuit never indicated that it is "unnecessary" for litigants to "comply" with Rule 56(f).[3] Here, in fact, it

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[2] We note that this Court has twice denied certiorari when the Fifth Circuit held, as it did here, that the nonmovant did not need to file a Rule 56(f) affidavit because it met its substantive burden under the Rule. *See Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); *International Shortstop, Inc. v. Ralley's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 936 (1992).

[3] The Fifth Circuit has consistently enforced the *substantive* requirements of Rule 56(f) even in cases where it indicates unwillingness to create procedural traps because of the Rule. *See, Robbins v. Amoco Production Co.*, 952 F.2d 901, 907 (5th Cir. 1992); *Washington v. Allstate Insurance Co.*, 901 F.2d 1281, 1285-86 (5th Cir. 1990); *Netto v. Amtrak*, 863 F.2d 1210, 1216 (5th Cir. 1989); *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 136-37 (5th Cir. 1987); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). That — and only that — is what occurred here.

carefully limited its holding to "the unique facts of this case, taken as a whole," and "strongly urge[d] future litigants to file a formal Rule 56(f) motion in the district court when they seek additional discovery while a summary judgment motion is pending." 978 F.2d at 920, n.6.

Rule 56(f) is intended to protect — and certainly not hurt — nonmovants by "keep[ing] open the doors of discovery in order to adequately combat a summary judgment motion." 978 F.2d at 919 (material in brackets added). The "exception" to Rule 56(f) only applies where, as here, the substantive requirements of the Rule have been well met by other documentary filings and blind insistence that such statements be in affidavit form would produce manifest injustice. *See, e.g., Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.) (*en banc*), *cert. denied*, 414 U.S. 1116 (1973) ("Form is not to be exalted over fair procedures.").

The manifest injustice Petitioners seek in this case has no precedent. We have found no case (nor, apparently, have Petitioners) in which *any* circuit court has held that, although the nonmovant met its substantive burden under Rule 56(f), summary judgment would be upheld solely because of the lack of a ritualistic piece of paper saying "I am a Rule 56(f) affidavit."

This Court has consistently rejected arguments, like the one advanced by Petitioners, that thus distort the intent of rules of procedure:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice . . . would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941).[4]

Indeed, even among those circuits which Petitioners classify as requiring "strict compliance" with Rule 56(f), the cases actually either excuse the affidavit requirement altogether[5] or, after noting the absence of an affidavit, base their decision on deficiencies in the nonmovant's compliance with the substantive requirements of Rule 56(f).[6]

The other cases relied upon by Petitioners to create the appearance of a conflict are similarly unavailing.[7]

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[4] *See also, e.g., Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), where this Court reinstated a suit that the trial court dismissed because of defects in a Rule 23(b) affidavit: "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice."

[5] *Sames v. Gable*, 732 F.2d 49, 51-52 (3d Cir. 1984) discussed in *Lunderstadt v. Colafella*, 885 F.2d 66, 70-72 (3d Cir. 1989); *Harris v. Pate*, 440 F.2d 315, 317-19 (7th Cir. 1971).

[6] *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988); *Dreiling v. Peugot Motors of America, Inc.*, 850 F.2d 1373, 1376-77 (10th Cir. 1988); *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10th Cir. 1986); *Beltin v. Morris Nelson* Farms, Inc., 744 F.2d 53, 58 (8th Cir. 1984).

[7] In some, the nonmovant in fact *filed* an affidavit but it was held substantively defective. *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 422 (2d Cir. 1989); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 1388 (Fed. Cir. 1989); *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989); *United*

(continued...)

Thus, any differences among the circuits are attributable to differences in the facts of the cases, or such differences are hypothetical, appearing as they do in *dicta*. They are not the result of any real or substantial conflict among the circuits in the interpretation or application of Rule 56(f).[8]

II. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW IS INTERLOCUTORY AND CAPABLE OF RESOLUTION ON OTHER GROUNDS.

The decision of the Fifth Circuit makes no merits disposition. It simply remands the case to the trial court for

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[7](...continued)
States of America ex rel. Small Business Admin. v. Light, 766 F.2d 394, 398 (8th Cir. 1985); *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975). In others, no request for further discovery had been made in any form. *Pittman v. Gaines*, 905 F.2d 199, 201 (8th Cir. 1990); *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1081 (Fed. Cir. 1989); *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 317 (7th Cir. 1987). In the few remaining cases, there is no true conflict with the case *sub judice* because the cases do not indicate that any effort was made by the nonmovant to satisfy the substantive requirements of Rule 56(f). *Klepper v. First American Bank*, 916 F.2d 337, 343 (6th Cir. 1990); *United States v. McCallum*, 970 F.2d 66, 71 (5th Cir. 1992).

Petitioners suggest that *McCallum* and *Robbins v. Amoco Production Co.* are inconsistent with the "reasoning" in this case and that an intra-circuit conflict therefore exists. (Pet. at 20). However, any difference between those cases and this one is about factual differences and the strength or weakness of the attempted substantive Rule 56(f) showing.

[8] Even if a conflict developed at a future date, the issue is so hypertechnical, academic, and narrow that it is *per se* not worthy of the Court's time and attention. *Cf. Commissioner v. Factor*, 364 U.S. 932 (1961); R. Stern & E. Grossman, *Supreme Court Practice* 200 (6th Ed. 1986).

further proceedings. Thus, it is not ripe for Supreme Court review. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostok R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Respondent's merits claims were briefed below but not decided: "Because we find that the district court improperly curtailed discovery we do not address the summary judgment contentions." 978 F.2d at 920.[9]

We note here that if the Fifth Circuit sitting on plenary review, had believed (as Petitioners urge) that the record contained no issues of fact, it could simply have affirmed. Instead, the Court, to the extent it discussed merits, categorized as "disputed" facts that are at the "crux" of this case. 978 F.2d at 917.

Thus, it is unlikely that, even if this Court granted certiorari *and* remanded, the Fifth Circuit would affirm on *de novo* review. Having held that discovery was improperly cut off, the Fifth Circuit is likely to take a dim view of Petitioners' arguments that they are entitled to summary judgment as a matter of law. Nothing would even be accomplished by granting certiorari.

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[9] Thus, Petitioners misleadingly asserted that "the Fifth Circuit never questioned the district court's determination that Petitioners had discharged their burden under Rule 56(c)" and that "the Fifth Circuit never took issue" with the trial court's ruling on the third-party beneficiary theory, "did not disagree" with the district court's contract analysis, and "reversed a fully substantiated summary judgment." (Pet. at 24 n.10; 30-31).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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